

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

November 8, 2006 Session

**KEVIN WAYNE HARLESS v. HOPE ANN WELDON HARLESS**

**Appeal from the Circuit Court for Hawkins County**  
**No. CV-990      Kindall T. Lawson, Judge**

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**No. E2006-00192-COA-R3-CV - FILED MARCH 26, 2007**

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Kevin Wayne Harless ("Father") filed a complaint for divorce against his wife, Hope Ann Weldon Harless ("Mother"), seeking to dissolve their marriage of some 7 years. Mother answered and filed a counterclaim. Each of the parties sought to be designated as the primary residential parent of the parties' three young daughters. A pendente lite order was entered temporarily designating Mother as the primary residential parent. Following a plenary trial, the court below announced its decision from the bench, stating it found that the children's best interest would be served by designating Father as their primary residential parent. Four months passed before a judgment was entered incorporating the trial court's oral pronouncements. Before the judgment was entered, Mother filed a petition for contempt, contending that, since the trial court had said that its decree would be effective when the final judgment was entered, Father was obligated to pay her child support for the four-month period immediately following the trial court's oral pronouncement of its decision. The trial court held that Father was under no obligation to pay child support once the court orally decreed that Father would be the children's primary residential parent. Mother appeals, claiming the evidence preponderates against the trial court's finding that it was in the children's best interest for Father to be their primary residential parent. Mother also challenges the trial court's conclusion that Father was not required to pay child support and alimony during the four-month period immediately following the court's announcement from the bench. We affirm the trial court's designation of Father as the children's primary residential parent, but reverse the court's judgment that Father was not required to pay child support for the four-month period between pronouncement of the decision and the entry of the final judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed in Part and Reversed in Part; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Keith A. Hopson, Kingsport, Tennessee, for the appellant, Hope Ann Weldon Harless

Gregory W. Francisco, Kingsport, Tennessee, for the appellee, Kevin Wayne Harless.

## **OPINION**

### **I.**

Mother and Father were married in August 1997. The parties have three daughters, who, at the time of trial, were 2, 4, and 7. Father filed a complaint for divorce in February 2004, asserting that the parties had irreconcilable differences. The complaint also alleges, in somewhat curious language, that “inappropriate marital conduct exist[s] between these parties.” Mother answered the complaint, generally denying the pertinent allegations, except that Mother admitted irreconcilable differences had arisen between the parties. Mother also filed a counterclaim seeking a divorce and claiming it was Father who was guilty of inappropriate marital conduct.

In April 2004, the trial court entered a “Pendente Lite Order” which temporarily designated Mother as the children’s primary residential parent. The court granted Father co-parenting time of two full days each week. The trial court also ordered Father to pay Mother child support of \$327.69 every other week and alimony of \$69.23 at the same time.

A trial was held in April 2005, at which time the parties announced to the court that they had reached an agreement regarding the distribution of their marital assets and debts. Mother also informed the court that she was withdrawing her claim for alimony. The only remaining issues were (1) the determination of the children’s primary residential parent, (2) the amount of child support to be paid by the other parent, and (3) the terms of a parenting plan.

Father testified that he was living in the former marital residence. He stated that he had been employed by BAE Systems for two years and that he earned approximately \$32,000 in 2004. Father worked full-time and his work schedule was such that out of any given 28-day period, he worked 14 days. In the parenting plan submitted by Father, he proposed that he be designated the primary residential parent and that he have physical custody of the children on the days he did not work, with Mother having physical custody of the children on the other days. Father stated that his proposed parenting plan was such that the children would be spending substantially equal amounts of time with each parent. According to Father, the parties had previously agreed to an equal co-parenting time schedule which had been implemented by the parties for several months. Although the parties announced to the court, pre-trial, their agreement as to equal co-parenting time, no order confirming that agreement was ever entered.

Father stated that the co-parenting schedule had worked well until Mother came to Father’s residence with her boyfriend, a Mr. Thompson, to retrieve some personal belongings. Father explained that when Mother brought Mr. Thompson to the house, problems arose and the police were called to supervise the exchange of property. Once this happened and because no order had been

entered adopting the new co-parenting schedule, Mother reverted to the terms of the pendente lite order and unilaterally reduced Father's co-parenting time.

Father testified that his marriage to Mother ended when he discovered Mother was having an affair with Mr. Thompson. Father and Mother separated when Father learned of the affair. Mother eventually began living with Mr. Thompson.

Father expressed concern about Mother living with her boyfriend while the parties' children were present. Father also stated that he is concerned because Mother has a bad temper and has demonstrated that temper in her handling of the children.

Father testified that he was in a new relationship, but that his girlfriend did not live with him. According to Father, his girlfriend and her children reside with her mother. Father testified that his girlfriend has spent the night at Father's residence, but never when his children were present.

Father testified that he was injured in a motorcycle accident and, for a period of time, was receiving short-term disability benefits which were less than his normal income. As a result, Father fell behind on the mortgage and in his child support payments. However, at trial, Father testified that these obligations were then current.

Father stated that his proposed parenting plan was in the children's best interest. He has two sisters – both of whom have children – who are available to help him with the children. Father stated that he did not anticipate needing their assistance. Father added that he assisted Mother whenever the children were in her care and she needed help with them, such as when she was attending a college class or the like.

Father discussed the various recreational activities he and the children enjoy. Father also described the daily routine when the children were with him. Father said he was able to care for the children's needs and make sure they are clean and eat proper meals. Father pays for the children's health insurance.

Mother testified she left the marital residence because Father threatened to commit suicide. Mother acknowledged, however, that Father had not shown that type of behavior since they separated. Mother stated that Father has diabetes which she believes causes his behavior to be extreme at times.

When asked if she had an anger management problem, Mother stated it "all depends on who [it is] and how far they push me...." Mother admitted that when she and Father are exchanging physical custody of the children, she has made derogatory comments to Father and the children "might" have heard those comments.

Mother admitted moving in with Mr. Thompson while still married to Father. She acknowledged that Mr. Thompson is her boyfriend and that they live together and sleep in the same

bed. Mother stated that their bedroom door is locked when they have sexual relations. She admitted that she and Mr. Thompson share the same bed in front of the children. When asked if she thought there was anything morally wrong with her living with a man who was not her husband and doing so in front of the children, Mother stated it was “a judgment call” and in her judgment, “I don’t see a problem with it.” The house in which Mother is living is owned by Mr. Thompson. Mother added that based upon her observations, Father’s girlfriend appears to be living with Father.

Mother stated that she took the children to their doctor and dentist appointments. Mother described how she takes care of the children by bathing them, making sure they eat properly, and taking the children to the park, the library, and to church. She claimed that on a couple of occasions the children were not properly bathed when they were returned by Father.

Mother completed the parenting program called Children First; Father had not completed that program at the time of trial.

Mother believed the co-parenting schedule set forth in the pendente lite order was working well. She claimed the previous schedule where Father had physical custody of the children on his days off did not work well because the children were tired, confused, and “didn’t know where home was at that point.” Mother believed it was in the children’s best interest for her to be designated as their primary residential parent.

Mother is employed by Cellular Sales of Knoxville and works approximately 30 hours per month and earns \$8.00 per hour. Mother is attending college full-time.

The trial court announced its decision from the bench. The court stated, in part, as follows:

I have a responsibility for the future of three little girls. I have a father who doesn’t even bother to go to parenting classes. And a mother who doesn’t find any problem with living with somebody to whom she is not married while she is married to this gentleman. I don’t think I have a good choice, frankly. I see problems with both sides and serious problems too. . . . [T]o tell you the truth, I think what I see is folks who are more interested in themselves than they are the kids. That’s pretty harsh words, but that’s what I mean when I say it.

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Considering this case as I see it at this point . . . I think the best thing for the children – and that’s the only thing I’m deciding – at this point . . . I think that the best arrangement for the children right now is that the father be the primary parent.

The trial court entered a final judgment for divorce incorporating its findings as well as the property settlement agreement of the parties. In the final judgment, the trial court designated Father as the primary residential parent. The court established Mother's co-parenting time as every other weekend. Mother also was awarded co-parenting time of approximately one-half of the Christmas vacation, one-half of spring break, and two full weeks during the summer. The trial court also ordered that neither parent was to have overnight guests in the presence of the children.

Unfortunately, it took four months following the trial before the parties submitted a final judgment to the court. The parties apparently were unable to agree on the terms of a final judgment until they returned to court in connection with Mother's post-trial petition for contempt. In the petition, Mother claims that following the trial, and even though the trial court specifically stated that Father was to be the primary residential parent, she was under no obligation to abide by that new parenting schedule until the trial court actually entered its final judgment incorporating its oral pronouncement. In other words, Mother claims that, notwithstanding the trial court's oral ruling, she was entitled to maintain primary residential custody of the children and Father was required to pay child support until the final judgment was entered four months later. Mother sought to have Father held in contempt for not making his court-ordered monthly child support payments during the four-month period following the trial. Mother also claims Father still was responsible for payment of temporary alimony for that four-month period following the trial even though she expressly abandoned her request for alimony at trial. Mother also contends that Father was behind one \$396.92 payment that had accrued prior to the April 2005 trial.

The trial court concluded Father was behind one payment in child support and alimony which had accrued prior to trial. The trial court held Father in civil contempt and ordered him to make that one payment totaling \$396.92. The trial court refused to order Father to make payments for any period of time after the court orally announced its decision. According to the trial court:

[If the order] had gone down as it should have, he would not have been paying [child support]. Then I don't think I'm inclined to order him to pay things that he would not have paid had the order been entered like it should have. . . . [Mother] could have done what the order essentially said to do, was turn the children over to him. . . . I don't think she can have it both ways. She can't claim she's entitled to money on the one hand because of some pendente lite situation and refuse to turn the children over even though the Court had ordered it just because you don't get the order down.

Mother filed a Rule 59 motion for new trial or to alter or amend the final judgment. In her motion, Mother claimed the evidence preponderated against the trial court's decision to designate Father as the primary residential parent. Mother also emphasized that approximately five and a half months after the trial, she and Mr. Thompson were married. Mother further requested the trial court to reconsider its ruling on her petition for contempt. The trial court denied Mother's post-trial motion in its entirety.

## II.

Mother appeals, claiming the trial court erred when it designated father as the primary residential parent. Mother also claims that the trial court erred when it found Father to be only \$396.92 in arrears in child support and alimony and when it did not find him in contempt for not making the child support/alimony payments for the four-month period following the trial.

## III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

In *McBrayer v. Smitherman-McBrayer*, No. E2006-00040-COA-R3-CV, 2007 WL 187938 (Tenn. Ct. App. E.S., filed January 25, 2007),<sup>1</sup> we emphasized the importance of assessing witness credibility when a trial court is making a custody determination. We stated:

We have addressed the significance of the trial court's role in assessing witness credibility in a custody determination:

Custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. Accordingly, appellate courts are reluctant to second-guess a trial court's decisions.

*Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). *See also Lockmiller v. Lockmiller*, E2002-02586-COA-R3-CV, 2003 WL 23094418, at \*4 (Tenn. Ct. App. E.S., filed December 30, 2003), a case involving the custody of a child, wherein we opined as follows:

The credibility of witnesses is a matter that is peculiarly within the province of the trial court. *See Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). That court has a distinct advantage over us: it sees the witnesses *in person*. Unlike an appellate court - which is limited to a "cold" transcript

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<sup>1</sup>As can be seen, the time for the filing of a Tenn. R. App. P. 11 application for permission to appeal has not yet expired.

of the evidence and exhibits - the trial court is in a position to observe the demeanor of the witnesses as they testify. This enables the trial court to make assessments regarding a witness's memory, accuracy, and, most importantly, a witness's truthfulness. The cases are legion that hold a trial court's determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g., Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

(Emphasis in original). It is not the role of an appellate court to “tweak a visitation order in the hopes of achieving a more reasonable result than the trial court,” but rather, such courts should only set aside the trial court’s judgment when it “falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). While *Eldridge* dealt with visitation, and not a decree of primary residential parent status, the thrust of the above quote would apply with equal force to the latter type of decree.

*McBrayer*, 2007 WL 187938, at \*5.

#### IV.

##### A.

The statutory factors to be considered when a court makes an initial custody determination are set forth in T.C.A. § 36-6-106(a) (2005). In relevant part, those factors are as follows:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment; . . . .
- (4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

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(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

T.C.A. § 36-6-106(a) (2005). We are also mindful of T.C.A. § 36-6-412 (2005) which states:

It is the legislative intent that the gender of the party seeking to be the primary residential parent shall not give rise to a presumption of parental fitness or cause a presumption in favor of or against such party.

Mother's primary argument on appeal is that the trial court failed to consider all of the pertinent statutory factors and placed too much emphasis on the fact that she was living with Mr. Thompson. Mother argues that this latter assertion is supported by the fact that the trial court failed to discuss each of the pertinent factors set forth in T.C.A. § 36-6-106(a).

In an appellate review, it is helpful if a trial court discusses each of the applicable factors, as well as how those factors impact its overall custody determination. However, a trial court is not statutorily required to do so. In ***Bell v. Bell***, No. W2004-00131-COA-R3-CV, 2005 WL 415683 (Tenn. Ct. App. W.S., filed February 22, 2005), *no appl. perm. appeal filed*, we explained:

[T]he trial court was obligated to consider the applicable statutory factors in Section 36-6-106(a) in reaching its decision regarding the comparative fitness of the parties. *See Burnette v. Burnette*, E2002-01614-COA-R3-CV, 2003 WL 21782290, at \*6 (Tenn. Ct. App. July 23, 2003). "However, the statute does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination." *Id.* Moreover, not every factor is applicable in a given case, and the trial judge is required to consider only the factors which are applicable.



*Id.*; see also *Mueller v. Mueller*, W2004-00482-COA-R3-CV, 2004 WL 2609197, at \*6 (Tenn. Ct. App. Nov. 17, 2004).

*Bell*, 2005 WL 415683, at \*5 (footnote omitted). The fact that Mother was living with Mr. Thomson in the presence of the children, while not necessarily determinative, is, nevertheless, a factor that can be considered. See, e.g., *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847 (Tenn. Ct. App. E.S., filed May 31, 2005), *no appl. perm. appeal filed*.

With regard to the first two factors set forth in T.C.A. § 36-6-106(a), *supra*, there is no proof in the record that either of these factors favor one parent over the other. There is no proof that the love, affection and emotional ties are stronger between Father and the children than those existing between Mother and the children. The proof establishes that both parents are able to provide for the children's basic needs of food, clothing, medical care, and the like.

The third factor does tend to favor Mother because she was usually the primary residential parent, although Father did exercise a substantial amount of co-parenting time and, for a period of time, he was actually exercising equal co-parenting time. There was no proof that the fourth or fifth factors in T.C.A. § 36-6-106(a) clearly favored one parent over the other.

Another relevant factor is a parent's willingness to facilitate and encourage a close and continuing relationship between the child and the other parent. T.C.A. § 36-6-106(a)(10). There was proof, admitted to by Mother, that she made derogatory remarks to Father in the presence of the children. There was no proof that Father engaged in similar conduct.

The evidence in this case establishes that even though Mother and Father both have areas in which they could improve, both parents are, nevertheless, fit to care for their children. Again, we emphasize that we must not set aside the trial court's judgment as to custody unless it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88. When examining the relevant statutory factors, some of those factors tend to favor Father, others tend to favor Mother, while others favor neither parent over the other. After a careful review, we are unable to conclude that the trial court's designation of Father as the primary residential parent "falls outside the spectrum of rulings that might *reasonably* result from an application of the correct legal standards to the evidence found in the record." *Id.* (emphasis added). The judgment of the trial court designating Father as the primary residential parent is, therefore, affirmed.<sup>2</sup>

We must utilize the same standard when reviewing the amount of co-parenting time the trial court awarded Mother. On appeal, Mother challenges the entire parenting plan entered by the trial court by claiming she should have been designated the primary residential parent. Mother does not

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<sup>2</sup> We review the trial court's judgment in light of the facts as they existed at the time of trial. Therefore, Mother's marriage to Mr. Thompson five and a half months following trial cannot be considered when determining whether the trial court erred when it designated Father as the primary residential parent.

argue that, if this Court affirms the trial court's designation of Father as the primary residential parent, it should hold that Mother's co-parenting time is not adequate. Very briefly, we note that Mother testified that the equal co-parenting time schedule the parties previously operated under for several months was not working well and was not in the children's best interests. Mother was essentially awarded the standard amount of co-parenting time received by a non-custodial parent. To the extent that Mother's brief can be interpreted as challenging the amount of co-parenting time she was awarded, we find no error in the parenting plan established by the trial court.

B.

When the parties returned to court for a hearing on Mother's petition for contempt, each party blamed the other for the excessive delay in getting the final judgment entered. The trial court was disturbed by the delay but refused to cast blame on one particular party. At the time the trial court announced its decision from the bench, counsel for Mother inquired as to when that decision would be effective. In response, the trial court stated that its ruling would become effective upon the signing of the final judgment. Because the final judgment was not signed until four months later, Mother claims the trial court erred when it failed to order Father to pay child support and alimony pursuant to the terms of the pendente lite order for that four-month period.

We can understand the trial court's dismay at the fact the parties took four months to submit a final judgment. However, the record on appeal is insufficient for this Court to make a determination as to whether Mother, Father, or both, were responsible for the delay.

Child support is clearly intended for the benefit of children and not for the benefit of the payee spouse. See *Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991). Because child support is for the benefit of children and because the children in the instant case were primarily in Mother's care for the four months in question and she was paying for their primary needs, we hold that the trial court erred when it concluded that Father should not be obligated for the child support portion of the monthly payment for the four months under discussion. In reaching this conclusion, we again emphasize that we are unable to state that Mother was solely responsible for the four-month delay in getting the final judgment entered. We also emphasize that the trial court had specifically stated that its ruling would not become effective until the entry of the final judgment.<sup>3</sup> Even though Father should be burdened with the obligation to pay child support for the four-month period following trial, we do not believe he should be held in contempt of court for not making those payments; accordingly, we affirm the trial court's judgment insofar as it holds that Father is not in contempt. On remand, the trial court is to compute the amount of child support due under the pendente lite order. The trial court also should determine how this arrearage should be paid. In establishing a

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<sup>3</sup> We express no opinion on whether our conclusion would be any different if the trial court had not stated when its determination would become effective or if we were able to conclude that Mother was responsible for the four-month delay in getting the final judgment entered.

payment plan, the trial court should ensure that it is structured in a way that will not interfere with Father's monetary responsibilities as the children's primary residential parent.

Unlike child support, alimony is for the benefit of the receiving spouse. We reject Mother's claim that she is entitled to any post-trial alimony when she unequivocally abandoned that claim at trial. The judgment of the trial court that Father was not obligated to pay post-trial alimony is affirmed.

V.

The judgment of the trial court is affirmed in part and reversed in part. This cause is remanded to the trial court for further proceedings consistent with this opinion and for the collection of costs assessed below. Costs on appeal are assessed one-half to the appellant, Hope Ann Weldon Harless, and one-half to the appellee, Kevin Wayne Harless.

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CHARLES D. SUSANO, JR., JUDGE